

104 CMR 29.15 is stricken and replaced with the following:

29.15: Appeals of Eligibility and Service Planning

(1) General Provisions.

- (a) 104 CMR 29.15(3) contains the standards and procedures for appeals of denial or termination of eligibility based on clinical criteria pursuant to 104 CMR 29.04(3) .
- (b) 104 CMR 29.15(4) contains the standards and procedures for appeals of denial of eligibility based on need for DMH continuing care services pursuant to [104 CMR 29.04\(4\)](#), of major individual service planning and implementation decisions, of lowering of priority for DMH continuing care services pursuant to [104 CMR 29.12](#) and of termination of eligibility for DMH continuing care services pursuant to [104 CMR 29.13](#).
- (c) To the maximum extent possible, disagreements among the parties should be informally resolved prior to utilizing this appeal mechanism.
- (d) An appeal on all appealable matters may be initiated by any of the following individuals:
  - 1. an individual who has been denied eligibility or whose priority for services has been lowered, or his or her legally authorized representative, if any;
  - 2. a client or his or her legally authorized representative, if any;
  - 3. a person designated by the individual or client to act as his or her representative, if there is no legally authorized representative.

(2) Subject Matter of an Appeal. The following issues may be appealed:

- (a) Whether denial of eligibility based on clinical criteria pursuant to [104 CMR 29.04\(3\)](#) has a reasonable basis;
- (b) Whether denial of eligibility based on need for DMH continuing care services pursuant to [104 CMR 29.04\(4\)](#) has a reasonable basis;
- (c) Whether the comprehensive assessment of service needs, the individual service plan or the program specific treatment plans are consistent with the requirements of [104 CMR 29.06](#) through [29.08](#);
- (d) Whether the comprehensive assessment of service needs is sufficient to serve as the basis for the individual service plan or the program specific treatment plans;
- (e) Whether the comprehensive assessment of service needs, the individual service plan or the program specific treatment plans have a reasonable basis;
- (f) Whether the service goals and objectives, and timelines stated in the individual service plan or program specific treatment plan(s) are appropriate and reasonably related to the client's needs as identified in the application process or the comprehensive assessment of service needs;
- (g) Whether the services identified in the comprehensive assessment of service needs, individual service plan or the program specific treatment plans are consistent with the client's needs, and provided in the least restrictive setting possible;
- (h) Whether the individual service plan is being implemented in accordance with 104 CMR 29.00;
- (i) Whether modification of an individual service plan, program specific treatment plan,

services or change in service provider has a reasonable basis;

(j) Whether change in status to a lower priority pursuant to [104 CMR 29.12](#) has a reasonable basis;

(k) Whether termination of eligibility for DMH continuing care services pursuant to [104 CMR 29.13](#) has a reasonable basis;

(l) Whether the procedures set forth in 104 CMR 29.00 for developing the individual service plan and program specific treatment plan(s) have been followed.

(3) Appeal of Denial of Eligibility Based on Clinical Criteria. If an individual's application for eligibility for DMH continuing care services is denied by the Department based on clinical criteria, the denial may be appealed as follows:

(a) Informal Conference. The individual or his or her legally authorized representative, if any, may request an informal conference with the Area Director or designee within ten days of receipt of the notice of the denial of application for eligibility based on clinical criteria. The individual or his or her legally authorized representative, if any, may bring other persons to this conference, if he or she wishes. After such meeting, if the issues are not resolved, the individual or his or her legally authorized representative, if any, shall be notified that a written request for reconsideration may be submitted to the Area Medical Director.

(b) Request for Reconsideration. The individual or his or her legally authorized representative, if any, may submit a written notice of request for reconsideration to the Area Medical Director within ten days after conclusion of the informal conference. The request for reconsideration must indicate the basis of the request for reconsideration of the denial of the application, and may include any additional information which might support a reversal of the denial of application. The Area Medical Director shall render a written decision within ten days of the time he or she receives the request for reconsideration, unless the time is extended by mutual consent of the Area Medical Director and the person filing the request for reconsideration. If the denial of the application is not reversed by the Area Medical Director, a written decision letter shall be sent to the person who filed the request for reconsideration, and shall include notice of the right to pursue an appeal to the Deputy Commissioner for Clinical and Professional Services. If the denial of the application is reversed by the Area Medical Director, a written decision letter must be sent to the person who filed the request for reconsideration. Such decision will be final.

(c) Notice of Appeal. The individual or his or her legally authorized representative, if any, may submit a written notice of appeal to the Deputy Commissioner for Clinical and Professional Services within ten days of receipt of the written decision by the Area Medical Director affirming the denial of the application. This notice of appeal must indicate the basis of the appeal, and may include any additional information which might support a reversal of the denial of the application. The Deputy Commissioner shall render a decision within ten days from the time he or she receives the notice of appeal, unless an extension is agreed upon by mutual consent of the Deputy Commissioner and the person filing the appeal.

(d) If the individual wishes to appeal from the Deputy Commissioner's decision, he or she may petition the Commissioner or designee for a fair hearing pursuant to 104 CMR 29.15(5).

(4) Appeal on All Other Appealable Matters.

(a) An appeal is initiated by submitting a written statement to the Area Director, indicating what is being appealed and the basis for the appeal.

(b) An appeal must be initiated within 30 days after the occurrence of the action or inaction which forms the basis for the appeal. The Area Director may, however, accept an appeal after 30 days for good cause.

(c) Informal Conference.

1. The Area Director or designee shall hold an informal conference with the client, the client's legally authorized representative, if any, the client's designated representative, if any, the client's case manager, the program director, if appropriate, and other invited persons, if appropriate, within 20 days of notification of the appeal for the purpose of resolving the matter being appealed. To the extent that resolution satisfactory to all persons is not achieved, the Area Director or designee shall clarify issues for appeal and shall determine the agreement, if any, of the parties as to the material facts of the case.
2. Except to the extent that statements of the parties are reduced to an agreed statement of facts, all statements of the parties made during the informal conference shall be considered as offers in compromise, and shall be inadmissible in any subsequent hearing or court proceedings pursuant to the provisions of 104 CMR 29.15.
3. The Commissioner or designee and the appealing party may agree to a waiver of the informal conference, in which case the appeal shall go directly to a fair hearing, pursuant to the provisions of 104 CMR 29.15(5).

(5) Fair Hearing. If an appealing party wishes to appeal from the Deputy Commissioner's decision with regard to clinical criteria pursuant to 104 CMR 29.15(3), or if all other issues under appeal are not resolved at the informal conference pursuant to 104 CMR 29.15(4)(c), or if there is a waiver of such conference, he or she may petition the Commissioner or designee for a fair hearing within ten days after the Deputy Commissioner's decision, or completion or the waiver of the informal conference. Within ten days of such petition, the Commissioner shall appoint a hearing officer, who shall schedule a hearing date which is agreeable to both parties. Said fair hearing shall be conducted in a manner consistent with M.G.L. c. 30A and 104 CMR 29.15(5). Such hearing shall be governed by the informal fair hearing rules of the standard adjudicatory rules of practice and procedure at [801 CMR 1.02](#).

- (a) While the appeal is pending, the parties may agree to implement any part of the individual service plan or program specific treatment plan, or other matter under appeal without prejudice.
- (b) The fair hearing shall be conducted by an impartial hearing officer designated by the Commissioner or designee. The hearing officer may be an employee of the Department, provided, however, that no person shall be designated as a hearing officer in a particular appeal who is subject to the supervision of any facility or office within the region in which the individual applying for services is currently served or is proposed to be served.
- (c) The appealing party shall have the right to be represented by an individual designated by him or her, at his or her own expense;
- (d) If a client is unrepresented at the hearing, but requests assistance, or if for any other reason the Commissioner or designee determines it to be in the client's best interest, the Commissioner or designee shall designate a client advocate to assist the client in the appeal.
- (e) The appealing party and the Department shall have the right to present any evidence relevant to the issues under appeal, and shall have the right to call and examine witnesses.
- (f) The appealing party shall have the right to examine all records held by the Department

pertaining to the individual or client and all records upon which the individual service plan or program specific treatment plan is based.

(g) The fair hearing shall not be open to the public. The appealing party may invite persons of his or her choosing to attend. The hearing officer may also allow other persons to attend, if he or she deems such attendance to be in the best interest of the client or other appealing party. Invited persons may attend the hearing, as long as they do not disturb the hearing.

(h) Within 20 days of the close of the hearing, the hearing officer shall prepare and submit to the Commissioner a recommended decision which shall include a summary of the evidence presented, findings of fact, proposed conclusions of law, the recommended decision and the reasons for the decision.

(i) The findings of fact in the recommended decision shall be binding on the Commissioner. The Commissioner may modify the conclusions of law and decision where the conclusions or decision are: in excess of the agency's statutory authority or jurisdiction; based on an error of law; arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

(j) Within 15 days after receipt of the hearing officer's recommended decision, the Commissioner shall issue a decision which shall be the final decision of the Department on all issues.

1. The Commissioner's decision shall include a summary of the evidence presented, findings of fact, a decision on each of the issues appealed and the reasons for such decision, and a notice of the individual's right to appeal the decision to the Superior Court pursuant to M.G.L. c. 30A.

2. The Commissioner's decision shall be mailed to the appealing party and his or her legally authorized representative, if any.

3. Unless the Commissioner or designee orders a re-hearing, the decision of the Commissioner is the final decision of the Department on all issues.

(6) Re-hearing.

(a) Within ten days of receipt of the decision of the Commissioner by the client or his or her legally authorized representative, an appealing party may petition the Commissioner or designee to order a re-hearing on one or more of the following grounds:

1. That new evidence was discovered by the appealing party subsequent to the hearing, and that the new evidence is such that it would be likely to materially affect the issues being appealed;

2. That the hearing was conducted in a manner which was inconsistent with 104 CMR 29.15(5), or prejudicially unfair to the client or other appealing party;

3. That the decision is based on inappropriate standards or contains other errors of law;

4. That the decision is unsupported by any substantial evidence.

(b) The failure of the Commissioner or designee to grant or deny a petition for re-hearing within ten days of the submission of the petition shall be considered a denial of the petition.

(c) Upon order for a re-hearing by the Commissioner or designee, a hearing shall be conducted and a decision rendered anew, pursuant to the provisions of 104 CMR 29.15(5).

(7) Standard and Burden of Proof.

(a) The standard of proof on all issues shall be a preponderance of the evidence.

(b) Burden of Proof.

1. The burden of proof on the issue of denial of eligibility shall be on the individual who has been determined ineligible.
2. The burden of proof on the issues of whether the provisions of [104 CMR 29.06](#) through [104 CMR 29.11](#) have been complied with, and whether the comprehensive assessment of need, individual service plan and program specific treatment plans are reasonable and consistent with the needs of the client shall be on the Department.
3. The burden of proof on issues relating to lowering of priority pursuant to [104 CMR 29.12](#) or termination of eligibility pursuant to [104 CMR 29.13](#) shall be on the Department.

(8) Judicial Review. A client or his or her legally authorized representative, if any, aggrieved by a final decision of the Department pursuant to 104 CMR 29.15 may, within 30 days of receipt of the decision, or a decision after a re-hearing, seek judicial review of the decision, in accordance with the standards and procedures contained in [M.G.L. c. 30A, § 14](#).